The appeal Court clearly understood that the U.S. District Court's ruling made on August 3, 2004 was correct. The appeal Court's argument for affirming the U.S. District Court's decision made on October 26, 2004 rings hollow. The Appeal Court clearly understood that KFC's argument in its appellee brief was a pretext argument. In other words, the argument was not true. KFC's citations concerning Morgan, Fleck and Aspero were not analogous to the instant matter. In those cases there was a finding of guilt. The finding for arbitration was directly related to the concurrent finding of Guilt. There is no such finding of guilt in this instant matter. The Court of Appeals clearly understood that Courts have traditionally held that torts committed ***after*** employment case may be

arbitrated only if the claim involved significant aspects of the employment relationship and that a primary issue in resolving the claim was the truth of the employer's statements. KFC's statement, in this matter, have undeniably proven to be demonstrably false. The Court of Appeals clearly understood that this is a case of first impression. No courts or legislature in the U.S. have passed a rule of law that prohibits an employee from taking civil, legal action against his former employer for having him tried for a crime he did not commit, based upon an employee arbitration agreement.

There is no arbitration agreement, signed or otherwise, that can deprive anyone of his or her Constitutional rights, 5th Amendment (Rights of Persons) and 14th Amendment (Due Process).

REASONS FOR GRANTING THE PETITION

1. This is a case of first impression. There is no rule of law that sates that criminal activities are subject to employment arbitration agreement. Due process of the law expands with jurisprudential attitude and obligation for fundamental fairness. The current ruling of the Court does not support this concept.

CONCLUSION

The petition for a writ of certiorari should be granted. This ruling of the Court of Appeals as well as the ruling of the U.S. District Court is a prime example of discriminatory animus in the respectful opinion of the petitioner.

Respectfully submitted,

_____

Rev. Earnest L. Hobley

Date: March 17, 2006

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7202 September Term, 2005

04cv00492

Filed On: Dec. 22, 2005

Earnest L. Hobley, Rev.,
Appellant

v.

Kentucky Fried Chicken, Inc.,
Appellee

BEFORE: Ginsburg, Chief Judge,
and Sentelle,
Henderson, Randolph,
Rogers, Tatel, Garland,
Brown, and Griffith,
Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of
the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/_____
Michael C. McGrail
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7202 September Term, 2004

04cv00492

Filed On: Sep 9, 2005

Earnest L. Hobley, Rev.,
Appellant

v.

Kentucky Fried Chicken, Inc.,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Sentelle, Henderson, and Brown, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order filed October 26, 2004, in Civil Action No. 04-0492 be affirmed. Appellant's complaint alleges that appellee falsely reported him to District of Columbia Authorities as the perpetrator of an alleged theft that occurred while he was employed by appellee. On appeal, he challenges the district court's conclusion that this claim is covered by an arbitration agreement. Appellant concedes, however that he executed an arbitration agreement with appellee on May 27, 2001, when he filled out an employment application, and does not dispute that he signed another copy of the same arbitration agreement when he completed a renewed application for employment dated July 31, 2001, in connection with a promotion. The fact that appellant disputes whether he initiated an acknowledgement of the arbitration agreement is therefore immaterial.

The arbitration agreement provides that both appellee and appellant "agree to use confidential binding arbitration for

any claims that arise" between them, including claims concerning employment and termination of employment. Appellant argues that this arbitration agreement does not cover his "false accusation" claim, which deals with post-employment conduct by appellee. Courts have held, however, that torts committed after employment ceases may be arbitrable if the claims "involve significant aspects of the employment relationship." Morgan v. Smith Barney, Harris Upham & Co., 729 F .2d 1163, 1167 (8th Cir. 1984); see also Aspero v. Shearson American Express, Inc., 768 F .2d 106, 109 (6th Cir. 1985); Fleck v. E.F. Hutton Group, Inc., 891 F .2d 1047, 1051-52 (2d Cir. 1989); cf. Pearce v. E.F. Hutton Group, Inc., 828 F .2d 826, 832 (D.C. Cir 1987) (branch office manager's claims concerning events that occurred during his employment arose out of his employment because the events clearly concerned allegations "about his performance as a Branch Office Manager."). Here, the district court correctly determined that appellant's false accusation claim involves "significant aspects" of his employment relationship. See Morgan, 729 F .2d at 1167. Any determination

with respect to this claim would entail consideration of numerous facts concerning appellant's employment relationship and performance as Assistant Unit Manager. Moreover, the "federal policy favoring arbitration counsels that doubts about the intended scope of an agreement to arbitrate be resolved in favor of the arbitral process." Pearce v. E.F. Hutton Group, Inc., 828 F .2d at 830 (citing Moses H. Cone Hospital v. Mercury Construction Corp., 460 U.S. 1,24 (1983)). Accordingly, appellant's claims are within the scope of the arbitration agreement.

Finally, because appellant did not raise arguments in the district court proceedings concerning hearsay, the alleged illusory nature of the arbitration agreement, unconscionability, and the unequal bargaining power between the parties, he has waived such arguments on appeal. See District of Columbia v. Air Florida, Inc., 750 F .2d 1077, 1084 (D.C. Cir. 1984) ("issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

S/_____

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REV. EARNEST LEE HOBLEY,

Plaintiff,

v. **Civil Action No. 04-0314 (RMC)**
04-0492

KENTUCKY FRIED CHICKEN, INC.,

Defendant,

ORDER

For the reasons stated in the separate Memorandum Opinion on Motion for Reconsideration, the Court finds that the claim of false accusation in Case No. 04-0492 is subject to arbitration. As no justiciable claims remain, Plaintiff's complaint will be **DISMISSED**. This is a final appealable Order.

SO ORDERED.

DATE: October 26, 2004.

/s/
ROSEMARY M. COLLYER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REV. EARNEST LEE HOBLEY,

Plaintiff,

v. **Civil Action No. 04-** **0314 (RMC)**
04-0492

KENTUCKY FRIED CHICKEN, INC.,

Defendant,

MEMORANDUM OPINIONON ON MOTION RECONSIDERATION

Rev. Earnest Lee Hobley, brought two lawsuits, *pro se*, against KFC U.S. Properties, Inc. (sued as Kentucky Fried Chicken, Inc.) ("KFC") alleging fraud, wage-and-hour violations relating to his final paycheck, and the common law tort of "false accusation." KFC removed the cases from Superior Court and moved to dismiss the case. On August 3, 2004, the Court granted in part, and denied in part, KFC's motion to dismiss based upon the arbitration agreement signed by Rev. Hobley as a condition of his employment. *Hobley v. Kentucky Fried Chicken, Inc* Nos. 04-03114, 04-0492, Memorandum of Opinion (D.D.C. August 3, 2004) ("*Hobley I*"). KFC moves for reconsideration of

that part of the Court's opinion denying its motion to dismiss. The issue on reconsideration and whether a claim of false accusation for reporting an alleged theft by an employee is subject to arbitration under an agreement that applies to "any claims that arise between" the parties, where the theft is

1 Rev. Hobley filed his first complaint o January 21, 2004 complaining of fraud and a violation of KFC's final paycheck policy. This complaint also alleged termination due to "religious bias toward me being an Ordained preacher" based on 42 U.S.C. section 2000e. When this complaint was removed to federal court, Rev. Hobley moved to remand to Superior Court and argued that he was not asserting a claim under Title VII. Rev. Hobley filed a second complaint on February 24, 2004, alleging the common law tort of false accusation.

reported after the employment relationship has been severed. The Court finds that that the claim is subject to arbitration because it is a claim between the parties that arises out of their employment relationship. As no justiciable claims remain, Rev. Hobley's complaint will be dismissed.

BACKGROUDD FACTS AND PRIOR PROCEEDINGS[2]

On May 27, 2001 Rev. Hobley applied for employment with KFC. At that time, he signed an application form that included a provision entitled "ARBITRATION OF EMPLOYMENT RIGHTS." This arbitration clause stated: Because of the delay and expense of the court systems, KFC and I agree to use confidential binding arbitration for any

[2]The facts are laid out in *Hobley I* and will be summarized here only as relevant to the remaining issue.

claims that arise between me and KFC, its related companies, and/or their current or former employees. Such claims would include any concerning compensation, employment (including, but not limited to, any claims concerning sexual harassment), or termination of employment. Before arbitration, I agree: (i) first, to present any such claims in full written detail to KFC; (ii) next, to complete any KFC internal review process; and (iii) finally, to complete any external administrative remedy (such as with the Equal Employment Opportunity Commission). In any arbitration, the then prevailing rules of the American Arbitration Association (and to the extent not inconsistent, the then prevailing rules of the Federal Arbitration Act) will apply. *See* Motion to Enforce Arbitration Agreement and to Dismiss, Exh. A. Rev. Hobley

initialed a second, nearly identical, provision when he was eventually hired as an assistant manager on June 6, 2001. *See id* Exh. B.[3]

On July 31, 2001, Rev. Hobley began training for the position of Assistant Manager. One part of Rev. Hobley's training included instructions on KFC's Cash and Security Guidelines ("Guidelines"), for which he signed an "ACKNOWLEDGEMENT" [sic] that he had read and understood them. *See* KFC's Statement of Points and Authorities In support of its Motion for Reconsideration ("Motion"), Exh. 1.[4] The Guidelines detailed the

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[3]This provision stated because of, among other things, the delay and expense which result form the use of the court system, KFC and I agree to use confidential binding arbitration for any claim that arise between me

[4]The Acknowledgement included the statement, "I also understand that I will be subject to these guidelines in cases of cash losses or violations of guidelines...and that a breach of the KFC RESTAURANT CASH AND SECURITY GUIDELINES may result in corrective action up to and including termination of employment." *Id* (capitalized in original).

required procedure for daily transport and bank deposit of cash receipts, and warned that any theft of funds will be criminally prosecuted. *Id*. ("It is the intent of the Company to criminally prosecute all cases where theft is involved.") Rev. Hobley was the assistant Manager for the morning shift on February 7, 2003. Under the Guidelines, it was his responsibility to take the prior day's receipts out of the store's safe and deposit them at the bank. On February 8, 2003, Rev. Hobley resigned his employment after learning that he would be demoted for performance reasons.

Thereafter, KFC discovered that no deposit had been made on the morning of February 7, 2003. On February 28, 2003, the General Manager of the restaurant reported to the D.C. Metropolitan Police Department ("MPD") that Rev. Hobley had stolen

$1,589.12 from KFC-the day's receipts for February 7. An arrest warrant was issued and Rev. Hobley was arrested at his home on June 13, 2003. By judgment entered on February 6, 2004, the Superior Court of the District of Columbia found Rev. Hobley not guilty.

In its initial decision on KFC's motion to enforce the arbitration agreement and dismiss, this Court found the wage-and –hour claim arbitrable, but denied KFC's motion to dismiss Rev. Hobley's false-accusation claim because the event on which it is based-the February 28, 2003, report to the police - happened after his employment with KFC had been severed. While Rev. Hobley twice agreed to arbitrate "any claims that arise between [himself] and KFC," *Hobley I* reasoned that the agreement applied only to the claims that arose during Rev.

Hobley's employment. For this reason, his wage claim was referred to arbitration and his false accusation claim was not. KFC subsequently moved for reconsideration of that part of the Court's August 3, 2004 Order denying its motion to enforce the arbitration of Rev. Hobley's claim of false accusation.

ANALYSIS

There is a strong policy favoring alternative means of dispute resolution, *Masurovsky v. Green*, 687 A.2d 198, 201 (D.C. 1997), and any doubts concerning the scope of arbitrability will be resolved in favor of arbitration. *Moses v. H. Cone Mem'l Hosp. V. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Where an arbitration provision is "susceptible of an interpretation" that arbitration is required, a court must order arbitration. *Haynes v.*

Kuder, 591 A.2d 1286, 1289 (D.C. 1991). Whether any particular claim is subject to arbitration is a matter of the parties' agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995). See *Bailey v. Fed. Nat. Morg. Ass'n*, 209 F .3d 740, 746 (D.C. Cir.2000) (courts look to the contract to determine whether the parties have consented to arbitrate). The party resisting arbitration must prove that the claims at issue are unsuitable for arbitration. *Nelson v. Insignia/Esg., Inc*, 215 F, Supp. 2d 143, 150 (D.D.C. 2002).

The KFC arbitration agreement clause requests the parties "use confidential binding arbitration for any claim[s] that arise between [Hobley] and KFC..includ[ing] any claims concerning compensation, employment (including, but not limited to, any claims concerning sexual

harassment), or termination of employment." See Motion to Enforce Arbitration Agreement and to Dismiss, Exh. A. KFC reported Rev. Hobley to the MPD for allegedly stealing cash while he was an employee. The guidelines, which were a term and condition of Rev. Hobley's job and which he agreed to follow, create explicit duties for managing cash receipts. The Guidelines also provide the remedy for theft: "It is the intent of the Company to criminally prosecute all cases where theft is involved." Motion Exh. 1. A claim relating to a breach of these duties is one concerning...employment" and falls squarely within the scope of the arbitration agreement.[5] Rev.

[5]In Hobley I, this Court did not consider the Guidelines. Without the Guidelines, the Court found that Rev. Hobley's claim of false accusation was "not based on an event that had its genesis in something he did while a KFC employee." HobleyI at 6. Subsequent briefing included a copy of the Guidelines and clarified that Rev. Hobley initialed a second "acknowledgment" of the Guidelines when he was hired as Assistant Manager. Accordingly, this Court has considered the Guidelines in reaching its decision on the motion for reconsideration.

Hobley relies upon a distinction made by this Court in Hobley I that his false-accusation claim is not a claim "concerning...employment" because the report to the MPD occurred after his employment ceased. Response to KFC's Motion for Reconsideration at 2.[6] While the timing of a tort is probative on the question of arbitrability, this Court is persuaded that it is not necessarily dispositive. Torts committed after employment ends may be arbitrable if the claims "aris[e] out of the employment or termination of employment" of a plaintiff. *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1051-52 (2d Cir. 1989) (alleged post-employment defamation concerned truth or falsity

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[6] Although *Hobley I* distinguished the criminal report as a singular, post-employment event not subject to arbitration, its reasoning on arbitrability did not consider the Guidelines. *See Hobley I* at 6. As the Court now finds that disputes arising from the Guidelines are arbitrable, the fact that the criminal report occurred post-employment is less relevant.

of events during employment was arbitrable). See also *Aspero v, Shearson Am. Express, Inc.*, 768 F.2d 106, 109 (6th Cir. 1985) (post-termination claim of defamation arbitrable because resolution depended on evaluation of workperformance during employment); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984) (post-employment reports to brokerage agencies subject to arbitration since claims relied on handling of customer accounts during employment). Indeed, the determinative issue is not whether the tort occurred after the employment relationship had ceased. Rather, the "proper question is whether resolution of the claim depends upon evaluation of a party's performance...during the time of the contractual relationship." Aspero, 768 F.2d at 109. Rev. Hobley's claim of false accusation sounds in

defamation or malicious prosecution. Defamation requires evidence that: 1) the defendant made a false and defamatory statement concerning the plaintiff; 2) that the defendant published the statement without privilege to a third party; 3) that the defendant's fault in publishing the statement amounted to at least negligence; and 4) either the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm. *Carter v. Hahn*, 821 A.2d 890, 893 (D.C. 2003) (claim of defamation brought for false accusation that lead to criminal arrest). A claim of malicious prosecution requires evidence that: 1) the original action was instituted maliciously; 2) without probable cause; and 3) was terminated in the plaintiff's favor. *Ammerman v. Newman*, 384 A.2d 637,639 (D.C.

1978). In a defamation action, any determination that KFC negligently made a defamatory statement depends upon numerous facts that arise out of Rev. Hobley's employment relationship with KFC, including his duties under the Guidelines and his performance as Assistant Manager.[7] Further, proof of probable cause and malicious intent in a claim of malicious prosecution requires consideration of these same factual predicates. Accordingly, Rev. Hobley's false –accusation claim must be considered on that "arise[s] out of or relate[s] to" his former employment. Nur v. KFC, 142 F. Supp.2d 48 (D.D.C. 2001). That the final act constituting the alleged tort – a criminal report to

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[7] In addition, whether a qualified privilege exists because "a statement about suspected wrongdoing is made in good faith to law enforcement authorities" involves similar consideration of employment-based facts. *Columbia First Bank v. Ferguson*, 665 A.2d 650, 655 (D.C. 1995) (citations omitted).

the MPD – was published after he severed his employment relationship is a distinction of little importance.

The Court grants the motion for reconsideration and rules that Rev. Hobley's false-accusation claim comes within the parties' agreement to arbitrate disputes. The case will be dismissed.

A separate order accompanies this memorandum opinion.

DATE: October 26, 2004.

/s/
ROSEMARY M. COLLYER
United States District Judge